

Appeal from a decision of the Alaska State Office, Bureau of Land Management, vacating an earlier determination that a Native allotment application had been legislatively approved and rejecting the Native allotment application. AA-8252.

Affirmed in part and reversed and remanded in part.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

The legislative approval of certain pending Native allotment applications effected by section 905 of ANILCA, 43 U.S.C. § 1634 (1994), is constrained by the terms of that statute. So long as legal title remains in the United States, an erroneous initial determination by BLM that an allotment application has been legislatively approved does not deprive BLM of the authority to reconsider that determination and to conclude that the Native allotment application was not subject to legislative approval under the terms of the statute.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

Notwithstanding the fact that lands embraced within a recreation and public purposes classification as of Dec. 13, 1968, might never have been utilized for purposes consistent with that classification, the existence of such classification prevented the land from being "unreserved on December 13, 1968," within the meaning of section 905(a) of ANILCA and, therefore, allotments embracing such lands were not subject to legislative approval under ANILCA.

3. Administrative Authority: Generally--Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

Application of the principle of administrative finality involves jurisprudential rather than jurisdictional considerations. The doctrine of administrative finality will not be invoked where to do so would result in a manifest injustice.

4. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Segregation

Where the public land records have been noted to show that a specific parcel of land is not open to entry and settlement under the various public land laws, including the Alaska Native Allotment Act, such lands are not available until such time as the notation is removed and the land restored to entry, even if the original notation was made in error.

5. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Recreation and Public Purposes Act--Withdrawals and Reservations: Effect of

A recreation and public purposes classification, issued pursuant to the Recreation Act of 1926, as amended, 43 U.S.C. § 869 (1994), segregates lands from entry and settlement in conformity with its terms until such time as the classification is expressly revoked.

6. Administrative Practice--Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

The Board of Land Appeals will deny a request, filed in 1996, for a hearing on an assertion that qualifying personal use and occupancy of a parcel of land commenced prior to July 17, 1961, where the record shows that the Native allotment applicant had initially sought the grant of the allotment based on allegations that qualifying personal use and occupancy of the land had commenced in 1966 and had submitted an affidavit and witness statements attesting to this fact, and such application was rejected by BLM in 1978 because the land had been segregated from entry and settlement as of July 17, 1961, and the allotment applicant then pursued an appeal to the Board in which she maintained that qualifying personal use and occupancy commenced in 1966, which appeal was rejected in 1979.

7. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotment

Under the provisions of section 905(d) of ANILCA, unless the lands sought by a Native allotment application are part of a project licensed under part I of the Federal Power Act, lands within powersite withdrawals and classification are

available for allotment, subject to certain conditions applicable where the occupancy commenced after the withdrawal or classification.

APPEARANCES: Frederick Torrisi, Esq., Dillingham, Alaska, and James Vollintine, Esq., Anchorage, Alaska, for appellant; Carlene Faithful, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE BURSKI

Betty J. (Thompson) Bonin <sup>1/</sup> has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated October 18, 1995, vacating an earlier determination that her Native allotment application, AA-8252, had been legislatively approved and reaffirming a previous rejection of that allotment application. For the reasons provided below, we affirm. Inasmuch as the chronology of past events in reference to this allotment application plays a major role in the arguments pressed on appeal, we will set it out in some detail.

On November 27, 1972, the Bureau of Indian Affairs (BIA) forwarded to BLM Native allotment application AA-8252, which had been submitted by Betty J. Bonin on November 20, 1971, under the provisions of the Alaska Native Allotment Act, 34 Stat. 197, as amended, 70 Stat. 954, 43 U.S.C. §§ 270-1 to 270-3 (1970), repealed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617 (1994). Bonin's application described approximately 160 acres of land located in the Lake Iliamna area. In her application, Bonin asserted that she had used the land commencing in August 1966 for fishing and berry picking. She stated: "This land has been used by me and my ancestors before me. I go up almost every fall to pick berries and fish."

By letter dated November 11, 1974, Bonin was notified that the land described in her allotment application had been segregated from settlement under the public land laws by Multiple Use Classification (MUC) 818 on March 8, 1967, and was further advised that she would be required to show 5 years' use and occupancy prior to that date. <sup>2/</sup> BLM noted that Bonin

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<sup>1/</sup> While appellant was referred to as Betty J. Thompson throughout the proceedings below, she has since remarried and her present name is Betty J. Bonin. This name is used throughout the text of the decision, except for quotations and references to the Board decision in Betty J. Thompson, 43 IBLA 174 (1979).

<sup>2/</sup> Until 1979, Native allotment applicants were required to show the completion of 5 years' use and occupancy prior to any withdrawal of lands claimed under the Native Allotment Act. As indicated in the text of this opinion, infra, this policy was changed in 1975 insofar as it encompassed classifications under the Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1411-1418 (1964), so that, so long as use or occupancy was begun prior to the classification, a segregative classification would not bar allowance of an allotment claim. In 1979, Secretary Andrus issued Secretarial Order No. 3040, which rescinded the 5-year rule generally and

only claimed occupancy as of August 1966 and that its records indicated that Bonin was born on September 16, 1951. Based on these facts, BLM advised Bonin that she could not have completed 5 years of substantial use and occupancy prior to the segregation of the land. However, BLM afforded Bonin 60 days "within which to inform us if the dates or other information in your application is in error." Bonin did not, at that time, respond.

Approximately 16 months later, BLM sent Bonin another letter informing her that its previous letter had been incomplete. See Letter dated February 11, 1976. First of all, BLM noted that in Katie Wassillie, 20 IBLA 330, 331 (1975), the Board had applied supplemental guidelines issued by the Assistant Secretary, Land and Water Resources, on May 16, 1975, which directed that, so long as qualifying personal use or occupancy had commenced prior to a segregative multiple-use classification, that classification would not bar the subsequent completion of the requisite use or occupancy.

However, BLM advised Bonin that the land which she sought had also been within an area segregated from all forms of appropriation by two Recreation and Public Purposes (R&PP) orders, the earliest of which (No. 142) was dated July 17, 1961. BLM noted that these orders were not cancelled until January 20, 1969, by which time the land had been segregated by MUC 818. Accordingly, BLM informed Bonin that it would be required to take adverse action on her application. Bonin was again afforded a 60-day period in which to advise BLM if any of the dates or other information contained in her application were in error.

On April 22, 1976, Bonin submitted an affidavit to supplement her previous filings. In this affidavit, Bonin stated:

1. The land I am claiming as my allotment was used by my parents before me and by their parents before them. It has always been Native lands.
2. Everyone around recognizes that all the land in the area is Native land.
3. In 1966 I was taking care of myself. I stayed with my aunt in Naknek and went to school. For a time I worked with the Youth Opportunity Program. During the summertime I worked and helped support my family.
4. Starting in 1966 I gathered berries from my land. These berries were use for food for myself and my aunt. I caught fish also, beginning in 1966. My aunt and myself prepared the fish and ate them.

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fn. 2 (continued)

provided that, so long as use or occupancy was commenced prior to a withdrawal of the land in question, the subsequent withdrawal of the land would not bar allowance of the allotment provided that qualifying use occurred thereafter. See generally Eva Wilson Davis, 136 IBLA 258, 263-64 (1996).

In a letter accompanying this affidavit, counsel asserted that the R&PP orders could not bar Bonin's claim because they could not apply to Indian lands.

Following a negative field examination report which recommended rejection of the application for lack of evidence of qualifying substantial use and occupancy, BLM formally rejected the allotment application by decision dated January 23, 1978, based on a finding that Bonin had failed to establish 5 years' use or occupancy prior to withdrawal of the lands which she sought from appropriation. In this regard, BLM noted that, while most of the land had been withdrawn as of July 17, 1961, by the first of the two R&PP orders, a portion of the northern part of the land described in the application had actually been withdrawn on April 1, 1915, as part of Powersite Reserve No. 485, more than 35 years before appellant was born.

BLM further noted that, insofar as the lands not within the powersite reserve were concerned, the R&PP classification was terminated on January 20, 1969, but that the land then became subject to the withdrawal effected by Public Land Order No. (PLO) 4582 and the land remained in this withdrawn status until Congress repealed the Native Allotment Act when it adopted ANCSA. Thus, there was no period of time subsequent to the July 17, 1961, R&PP order during which the land in her application was open to appropriation and BLM rejected Bonin's application since it was premised on use and occupancy occurring after the land had been removed from appropriation. Bonin subsequently pursued an appeal from this determination to the Board.

Before the Board, Bonin made three basic arguments. First of all, she asserted that she should be permitted to tack ancestral use and occupancy which would predate even the establishment of Powersite Reserve No. 485 to her own, individual, qualifying use. Second, she assailed the 5-year prior requirement as unsupported in the law and as adopted in violation of the applicable provisions of the Administrative Procedure Act, 5 U.S.C. § 553 (1994). Third, she argued that the July 17, 1961, R&PP order was not a bar to allowance of her application on a variety of specific bases, including arguments that it did not constitute a withdrawal, that it expired by operation of law on January 17, 1963, and that it could not apply to the land in issue since that land was occupied by her ancestors at that time and were properly deemed to be "Indian land" within the meaning of section 1 of the R&PP Act, as amended, 43 U.S.C. § 869(c) (1994).

By decision styled Betty J. Thompson, reported at 43 IBLA 174 (1979), the Board affirmed rejection of Bonin's Native allotment application. With the sole exception of the application of the 5 years' prior rule, which, the Board noted, had been effectively revoked by Secretarial Order No. 3040 (see note 2, infra), the decision rejected all of Bonin's arguments, including those relating to the tacking of ancestral use and the various arguments that the R&PP order was ineffective with respect to

Bonin's occupancy. 3/ The decision concluded that none of the land sought by Bonin had been available for entry and appropriation during the entire period from July 17, 1961, to December 18, 1971, when Congress repealed the Alaska Native Allotment Act, see 43 U.S.C. § 1617 (1994), and, therefore, there was no point of time at which Bonin's rights could have attached to the land. 4/

The record discloses that, after receipt of this decision, a Legal Intern employed by Bonin's attorney, wrote to the Chief, Branch of Land and Mineral Operations, Alaska State Office, informing him that:

An appeal from [the Thompson decision] is planned. The appeal will await the outcome of Levitt [5/] and Shields [6/]

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3/ In particular, the Board rejected Bonin's contention that the classification had expired under its own terms. Bonin had relied upon that part of 43 U.S.C. § 869(a) (1994), which provided that "[i]f, within eighteen months following [classification for disposition under the R&PP Act], no application has been filed for the purpose for which the lands have been so classified, then the Secretary shall restore such lands to appropriation under the applicable public land laws." Based on this language, Bonin asserted that the segregative effect necessarily terminated on Jan. 17, 1963, i.e., 18 months after promulgation of R&PP Classification Order No. 142.

In rejecting this argument, the Board relied upon the decision of the Ninth Circuit Court of Appeals in Buch v. Morton, 449 F.2d 600 (1971), which had specifically held that this language was not self-executing and contemplated affirmative action by the Secretary to terminate a classification once made. No such action had occurred herein.

4/ The applicable use plats indicated that the northern portion of the land sought was within Powersite Reserve No. 485 and had, therefore, been removed from entry and appropriation on Apr. 1, 1915. From July 17, 1961, to Jan. 20, 1969, all of the land not within Powersite Reserve No. 485 was subject to the R&PP classification. However, on Jan. 17, 1969, 3 days prior to the revocation of that classification, PLO 4582 withdrew all land in Alaska from all appropriations. PLO 4582 remained in effect until the passage of ANILCA. Thus, those lands subject to the R&PP classification were not available after July 17, 1961, while the small parcel of land within Powersite Reserve No. 485 was not available as of Apr. 1, 1915. But see section 905(d) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(d) (1994).

5/ This is presumably a reference to Leavitt v. United States, Civ. No. A78-287 (D. Alaska filed Oct. 26, 1978). This case was a challenge to the Board's decisions in Georgianna Fischer, 15 IBLA 79 (1974), and Silas Negovanna, 15 IBLA 408 (1974), holding that lands within Naval Petroleum Reserve No. 4 were not available for allotment unless the claim was founded on personal occupancy predating the establishment of the reserve. In these decisions, the Board had expressly rejected claims premised on ancestral use. See, e.g., Georgianna Fischer, supra at 81. The issues surrounding these decisions were generally (though not completely) resolved by the adoption of section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1994). See generally Kate Aiken, 102 IBLA 131 (1988); Heirs of Doreen Itta, 97 IBLA 261 (1987).

6/ The litigation in Shields was an outgrowth of the Board's decision in Albert Shields, Sr., 23 IBLA 188 (1976), and numerous other cases,

allotment cases currently pending in Federal District Court. We would like this allotment to remain segregated. T. 8 and 9; R. 31 W.; Seward Meridian is the location. If contrary action is planned, please inform this office so we may preserve the applicant's rights during the pendency of Levitt and Shields.

(Letter dated November 3, 1980.)

On December 2, 1980, Congress adopted ANILCA, 94 Stat. 2371-2551. Section 905 of ANILCA, 43 U.S.C. § 1634 (1994), provided for legislative approval of Native allotment applications pending on or before December 18, 1971, under certain circumstances. Among the prerequisites for legislative approval was the requirement that the land described in the application must be "either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve--Alaska [NPR-A] (then identified as Naval Petroleum Reserve No. 4)." 43 U.S.C. § 1634(a)(1) (1994).

Subsequent to the adoption of ANILCA, BLM in Alaska reviewed all pending Native allotment applications to ascertain which ones were subject to legislative approval. By decision dated April 22, 1983, the Acting Chief, Branch of Case File Processing, Anchorage District Office, BLM, informed Bonin that "[y]our Native allotment application has been reviewed under the provisions of [ANILCA] and it appears your claim has been legislatively approved, effective June 1, 1981, pending confirmation of location." 7/ Bonin was afforded a 60-day period in which to file an amended description if the land described in her application was not the land for which she had intended to apply. Bonin made no further submissions.

Thereafter, a survey of the parcel was requested and the survey plat was officially filed on December 6, 1988. See U.S. Survey No. 8501, Lot 2. The case file discloses no further action with respect to this allotment application until issuance of the decision under appeal on October 18, 1995.

In its 1995 decision, BLM recounted much of the foregoing. However, after noting that its decision of April 22, 1983, had informed Bonin that

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fn. 6 (continued)

rejecting Native allotment applications for lands within the Tongass National Forest unless founded on use or occupancy predating the establishment of the National Forest. The Board's actions were affirmed both by the District Court (Shields v. United States, 504 F. Supp. 1216 (D. Alaska 1981)), and by the Ninth Circuit Court of Appeals (Shields v. United States, 698 F.2d 987 (1983)), which both held that Native allotment claims within the National Forest could only be allowed if based on personal and not ancestral use predating the establishment of the National Forest. 7/ In point of fact, the Legislative Approval Checklist which had been prepared for Bonin's claim indicated that her application was not subject to legislative approval since it indicated that the land was neither within NPR-A nor unreserved on Dec. 13, 1968.

her allotment application had been legislatively approved, the State Office declared that "[s]ince the lands claimed by the applicant were segregated prior to her initiation of use of the land, Native allotment application AA-8252 could not have been legislatively approved," because the land was not unreserved on December 13, 1968, as required by section 905(a) as a precondition for legislative approval. Based on this determination, BLM expressly vacated its April 22, 1983, decision in its entirety.

Insofar as the present status of the application was concerned, BLM noted that, while Powersite Reserve No. 485 was no longer viewed as a bar to approval of the allotment application (citing section 905(d) of ANILCA, 43 U.S.C. § 1634(d)(1994)), there existed no period of time during which the lands sought could have been appropriated by Bonin and therefore BLM rejected her application "as a matter of law." (Decision at 2.) Bonin then pursued the instant appeal to the Board.

On appeal, Bonin presents various arguments for reversing the decision below. First, she asserts that BLM's April 22, 1983, determination that her Native allotment application had been legislatively approved was a final decision for the Department and, therefore, BLM lacked the jurisdictional authority to revisit the question of her entitlement to an allotment. Second, Bonin argues that, even if BLM had authority to reconsider its April 22, 1983, decision, BLM should not have reversed it since, in point of fact, her Native allotment application was legislatively approved because the land was not reserved as of December 13, 1968, within the meaning of section 905(a) of ANILCA, if that provision is correctly interpreted. Third, she contends that, even if BLM had the jurisdictional authority to reconsider the question of legislative approval, it should be estopped from doing so since Bonin had relied upon that decision to her detriment. Fourth, should the Board determine that BLM had the authority to reconsider the decision and was not estopped from doing so, Bonin argues that the Board should reconsider the substantive holding in Betty J. Thompson, supra, that the R&PP orders effected a segregation of the land sufficient to prevent rights to a Native allotment from attaching while those orders were in effect. And, finally, Bonin asserts she is entitled to a hearing under the dictates of Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), on her present claim that, in fact, she has used the lands prior to July 17, 1961. We will discuss these arguments seriatim.

[1] Appellant premises her claim that BLM lacks the jurisdictional authority to reconsider its April 22, 1983, decision on Board decisions such as Eugene M. Witt, 90 IBLA 265 (1986), which have held that legislative approval under section 905 of ANILCA is "as final as actual issuance of the 'Native Allotment,' removing the Department's general authority to reexamine questions of entitlement in all cases where the allotment was subject to legislative approval, and leaving the Department with the purely ministerial task of surveying the allotment." Id. at 270. See Appellant's Reply Brief at 2-4. While we agree with our prior holdings that the effect of legislative approval is the equivalent of issuance of a patent insofar as the Department's authority to deny or otherwise limit the rights appurtenant thereto is concerned, we believe appellant has confused the question



of the determination of whether legislative approval has occurred under the terms of section 905 of ANILCA, 43 U.S.C. § 1634 (1994), with the question of what consequences flow as a result of legislative approval.

This issue was explored in Edward N. O'Leary, 132 IBLA 337 (1995). In the O'Leary case, BLM had issued a series of decisions including one which had declared that legislative approval of O'Leary's allotment application had occurred with respect to the unamended portion of O'Leary's original allotment application. When BLM subsequently determined that a protest of the amended description had the effect of subjecting the entire application to adjudication, including that part which BLM had previously determined had been legislatively approved, the applicant appealed arguing, inter alia, that once BLM had decided that the application had been legislatively approved in part, BLM lost authority to reexamine that question.

The Board rejected that argument. In particular, the concurring opinion explored this argument in some detail:

Congress, in enacting section 905(a) of ANILCA, has granted legislative approval of pending Native allotments except in certain situations specifically provided for in section 905(a). This approval was generally, by the terms of the statute, automatically effective upon the passage of 180 days and required no affirmative action on BLM's part to effectuate the approval. Any BLM decision informing an allotment applicant that his or her allotment has been legislatively approved is simply declaratory of existing fact. But, should BLM issue a determination that equitable title has passed under section 905(a) when, in point of fact, a valid protest was timely filed, equitable title does not vest in the applicant either under section 905(a) or by the force of BLM's declaration. Since, under the terms of the act, legislative approval only occurs under specified circumstances, BLM is powerless to expand these parameters either by design or inadvertence. Thus, when BLM discovers that it has erroneously treated an allotment as legislatively approved when, in reality, it was not, BLM not only has the authority to correct the record, it is required to do so, so long as legal title remains in the United States.

132 IBLA at 352 (concurring opinion; footnote omitted). We believe that the same conclusion properly obtains in the instant appeal. Legislative approval or issuance of a "certificate of allotment" would, indeed, remove Departmental jurisdiction to otherwise encumber allotments subject thereto. Appellant, however, does not assert, nor does the record indicate, that any "certificate of allotment" issued in response to appellant's application. The mere declaration by BLM that an allotment has been legislatively approved when it has not been approved does not deprive the Department of the jurisdictional authority to reverse that declaration and require that the allotment be adjudicated as provided by section 905 of ANILCA. As the concurring opinion in O'Leary noted:

[T]he mere determination of compliance with the requirements of the Native Allotment Act or the provisions of legislative

approval found in section 905(a) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a) (1988), absent passage of legal title, is not preclusive of the exercise of the Department's plenary authority to inquire into the validity of claims to assure that "valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved."

Id. at 351-52, citing Cameron v. United States, 252 U.S. 450, 459-60 (1920).

[2] Even assuming BLM had the authority to reexamine the question of whether or not the allotment application had been legislatively approved, appellant argues that BLM erred in concluding that it was not so approved. While appellant admits that the plain language of section 905(a) expressly provides that legislative approval is limited, inter alia, to applications which describe "land that was unreserved on December 13, 1968," appellant argues that the parcel for which she applied was not "reserved" within the meaning of this section.

Appellant's argument on this point is multi-faceted. Initially, she relies upon the following passage from S. Rep. No. 413, 96th Cong., 2d Sess., reprinted in 1980 U.S.C.C.A.N. at 5228:

Section 905(a)(1) approves, subject to valid existing rights and stated exceptions, allotment applications which were pending before the Department on or before the effective date of the Alaska Native Claims Settlement Act and which seek land that was unreserved on December 13, 1968, the day preceding publication of the application for Public Land Order 4582, 33 Federal Register 18591. Allotments located in areas reserved prior to the PLO "land freeze" are thereby excepted from the approval and are to be adjudicated pursuant to the Alaska Native Allotment Act. The use of the December 13, 1968, date is not to be construed as signifying a Congressional determination concerning the segregative date or effect of Public Land Order 4582.

(Emphasis supplied.) Based on the underlined passage, appellant argues that "a major purpose of the December 13, 1968 date was to protect lands withdrawn by PLO 4582 from allotment claims based on occupancy initiated after that date." (Appellant's Reply Brief at 7.) From this, appellant apparently concludes that, since the major impetus in the selection of the December 13, 1968, date was the protection of lands withdrawn by PLO 4582 from subsequent occupancy claims, it was not meant to cover claims such as those of appellant which were based on occupancy prior to that date.

Appellant's argument simply does not withstand analysis. The reason why the December 13, 1968, date was picked was not to prevent legislative approval of claims initiated subsequent thereto. On the contrary, the date was chosen clearly for the purpose of allowing legislative approval of those allotment claims which were initiated subsequent to that date on lands which would have been available but for the withdrawal effected by

PLO 4582. Indeed, it is clear from a reading of section 905(a)(1) that an allotment claim initiated on January 25, 1969, on land which, until PLO 4582, was not reserved, would be subject to legislative approval since, in conformity with the statute, the land was "unreserved on December 13, 1968."  
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Appellant also cites the legislative history of ANILCA with respect to the purpose of legislative approval being to "summarily approve allotments in all cases where no countervailing interest requires full adjudication." (Appellant's Reply Brief at 8, citing 1980 U.S.C.C.A.N. at 5181-82.) Appellant argues that no countervailing interest is present here since the R&PP classification had been superseded by PLO 4582 and "has no importance today and no public interest is served by applying it." (Appellant's Reply Brief at 8.) Appellant essentially argues that, in the absence of a continuing interest in classification of the land for R&PP purposes, the withdrawal effected by the R&PP classification should not bar legislative approval from attaching.

The problem with appellant's argument is that Congress simply made no provision for distinguishing between reservations in existence on December 13, 1968, which are still viable for the purpose for which they were created and other reservations in existence on that date which may not, at the present time, have any functional utility. Congress simply provided that, with two exceptions, if the land was not "unreserved on December 13, 1968," legislative approval would not apply and the application would instead be subject to adjudication under the provisions of the Native Allotment Act, supra.

The first exception is noted in the text of section 905(a), itself, which authorized legislative approval of allotments located on lands within the NPR-A, notwithstanding the fact that those lands were withdrawn as of December 13, 1968. See generally Kate Aiken, 102 IBLA 131 (1988). The second exception related to powersite lands. Section 905(d) of ANILCA, 43 U.S.C. § 1634(d) (1994), effectively removed the bar to approval of a Native allotment application (be it by legislative approval or by adjudication) which might otherwise arise because the lands described in the application included lands withdrawn, reserved, or classified for powersite or power-project purposes, unless those lands were included in a project

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8/ The reason that the Dec. 13, 1968, date was selected was that this was the earliest date which would not run into the controversy as to when the lands affected by PLO 4582 had been removed from entry and location. PLO 4582 was signed by Secretary Udall on Jan. 17, 1969, was filed with the Federal Register on Jan. 22, 1969, and was published on Jan. 23, 1969. See 34 Fed. Reg. 1025 (Jan. 23, 1969). However, as the regulatory history of PLO 4582 noted, the BIA application for a withdrawal had been published on Dec. 14, 1968, see 33 Fed. Reg. 18591, and, under the applicable regulations (43 C.F.R. § 2311.1-2(a) (1968)), the noting of the application on the official public land records would, itself, segregate the lands involved (in this case, all public lands in Alaska).

licensed under the Federal Power Act (FPA), 16 U.S.C. § 791a (1994). There was, however, one additional caveat. If an applicant's use of the lands had not commenced prior to their withdrawal or classification for powersite purposes, the allotment would be made subject to a limited right of reentry by the United States under section 24 of the FPA, 16 U.S.C. § 818 (1994).

Appellant cites the foregoing provisions of section 905(d) as supportive of her contention that, notwithstanding the fact that the land which she seeks to obtain was reserved for possible disposition under the R&PP Act as of December 13, 1968, it should nevertheless be considered to be "unreserved" as of that date, insofar as the scope of section 905(a) of ANILCA is concerned. In our view, however, the powersite exception actually undercuts her position.

Section 905(d) shows that Congress was fully aware of the fact that large areas in Alaska had been withdrawn for powersite purposes even though only a small amount of the land had actually been developed for those purposes. Congress chose to expressly provide that, in such cases, the prior existence of a withdrawal, reservation, or classification would not serve as an absolute bar to allowance of the allotment application. This provision, however, applies only to lands withdrawn for powersite purposes. Its adoption shows that Congress recognized that, absent section 905(d), powersite withdrawals, reservations, and classifications, would bar legislative approval and, in many cases, result in ultimate rejection of the allotment application even though the lands involved had never been used for powersite purposes. But Congress made no similar provision for any other type of withdrawals even though Congress was doubtless aware that these, too, would defeat an allotment application even though some of the lands embraced by such withdrawals and reservations had never been actually utilized for the purpose of the withdrawal or reservation.

Thus, we conclude that, regardless of the fact that lands embraced within an R&PP classification as of December 13, 1968, might never have been utilized for purposes consistent with that classification, its existence prevented the land from being "unreserved on December 13, 1968," within the meaning of section 905(a) of ANILCA. Therefore, Bonin's allotment application was not subject to legislative approval. <sup>9/</sup>

[3] Bonin's next argument is that BLM should be estopped from revisiting the question of legislative approval since she relied upon its 1983 determination that her application had been legislatively approved to her detriment. Appellant asserts that, based on BLM's 1983 declaration that her claim had been legislatively approved, she forwent appealing from

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<sup>9/</sup> This is, in fact, consistent with a long line of Departmental adjudications which have noted that, where a withdrawal of land has been noted on the land status records, such land remains withdrawn until there is a formal revocation or modification of the order of withdrawal and that the passage of time or accomplishment of the avowed purpose does not effect a restoration of the land. See, e.g., Trygve M. Olsen, 138 IBLA 321, 322-23 (1997); C.A. Braun, 119 IBLA 252, 254 (1991); Ronald W. Ramm, 67 IBLA 32, 34 (1982); Tenneco Oil Co., 8 IBLA 282, 284 (1972).

the Board's 1979 decision. Claiming that she would be prevented from now challenging that decision because the statute of limitations had expired, she argues that BLM should not be allowed to change the 1983 determination since to do so would deprive her of any right to challenge the predicates of the Board's 1979 decision in Federal court.

While the record before the Board shows that the initial delay in pursuing Federal court review was not occasioned by BLM's 1983 decision but rather was an outgrowth of appellant's desire to await rulings on cases then pending in the United States District Court for the District of Alaska (see notes 5 and 6, supra), there seems little doubt that the 1983 decision would have removed any incentive which appellant had to pursue judicial review of the Board's 1979 Thompson decision. Insofar as her present appeal is concerned, however, the 1983 determination has not adversely affected Bonin's ability to challenge the substance of BLM's actions before this Board. While appellant argues that application of the principle of administrative finality could operate so as to prevent the Board from reexamining the basis of the Thompson decision, recent Board pronouncements have underlined the point that application of the doctrine of administrative finality involves jurisprudential rather than jurisdiction considerations and, therefore, administrative finality will not be applied where to do so might result in manifest injustice. See, e.g., Eva Wilson Davis, 136 IBLA 258, 263 (1996). Given the facts of the instant appeal, we will reexamine the predicates of our earlier decision to determine whether or not its conclusions as to the effect of the R&PP classification can be sustained.

[4] In her challenge to BLM's assertion that the R&PP classification barred initiation of use after its notation, appellant essentially makes two points. First, she argues that use of an R&PP classification to remove the land from entry and settlement under the circumstances extant in the instant case violated State Office policies. Second, she argues that the classification should have expired on January 17, 1963, under the express provisions of 43 U.S.C. § 869 (1994), and the land would, therefore, have been open to subsequent entry and settlement. Both of these issues had been raised in Bonin's original appeal (see Statement of Reasons (SOR) dated April 28, 1978 (1978 SOR), at 6-15) and rejected. See Betty J. Thompson, supra at 176-77. For the reasons set forth below, we reaffirm the rejection of these arguments.

Appellant's first argument is based on a May 12, 1964, memorandum from the Alaska State Director addressing R&PP classifications on Bureau motion. The State Director noted that "R&PP classification of lands on our motion indicates our intent and purpose to make future use of these lands under terms and provisions of the R&PP act." He cautioned that "[t]his classification authority is not a substitute for withdrawal of lands," pointing out that instructions had been issued on September 25, 1962, to discontinue use of R&PP classification when withdrawal action should be initiated. See SOR, Ex. M.

The problem is that, even assuming arguendo that the initial R&PP classification was in error under the State Director's instructions, <sup>10/</sup> this would not make the classification a nullity. Thus, the State Director's 1964 memorandum advised that "[r]eview should be initiated of existing R&PP classifications and if improper for the purposes of the segregation, they should be cancelled and withdrawal initiated." Id. at 2. It did not effect their immediate cancellation or suggest that they were of no segregative effect.

In any event, it is well-settled that, where the public land records have been noted to show that a specific parcel of land is not open to entry or settlement under the public land laws, such lands are not available for settlement or entry until such time as the notation is removed and the land restored to entry, even if the original notation was made in error. See, e.g., Shiny Rock Mining Corp. v. Hodel, 825 F.2d 216, 219 (9th Cir. 1987); B.J. Toohey, 88 IBLA 66, 77-85, 92 I.D. 317, 324-28 (1985), aff'd sub nom. Cavanagh v. Hodel, No. A86-041 Civil (D. Alaska Mar. 18, 1988); Carmel J. McIntyre (On Judicial Remand), 67 IBLA 317, 327 (1982); California and Oregon Land Co. v. Hulen and Hunnicut, 46 L.D. 55, 57 (1917). Since the public land records clearly indicated that the land was not open to entry or settlement as of July 17, 1961, settlement could not lawfully be initiated thereafter until such time as the notation was removed and the land was restored to open status.

[5] Notwithstanding the foregoing, appellant argues that the initial classification should have expired, under the terms of the R&PP statute, no later than January 17, 1963. On this point, appellant relies on the language of 43 U.S.C. § 869(a) (1994), which provides that "[i]f, within eighteen months following such classification, no application has been filed for the purpose for which the lands have been so classified, then the Secretary shall restore such lands to appropriation under the applicable public land laws." Pointing to the use of the word "shall," appellant contends that the Secretary's obligation to restore the land to appropriation is mandatory and that the Secretary could not, merely by failing to affirmatively restore the land, keep the land from being subject to entry and appropriation. See generally 1978 SOR at 11-15.

The short answer to appellant's claims is that this precise issue was decided against her position in Buch v. Morton, 449 F.2d 600 (9th Cir. 1971). In that case, the appellant argued, inter alia, that the segregative effect of a R&PP classification should have automatically terminated 18 months after it was noted on the records, based on the statutory proviso. In rejecting this argument, the Court of Appeals noted that "this

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<sup>10/</sup> We would note that, in any event, the original R&PP classification was clearly not made in defiance of the State Director's instructions since the classification predated those instructions by over a year. Moreover, the second R&PP classification (AA-557) was approved on Nov. 23, 1966, a date well after the State Director's memorandum, and provides evidence that at least the Anchorage District Manager did not believe that classification of the subject parcels as suitable for lease or sale under the R&PP Act was violative of the State Director's instructions.

provision is not self-executing," and that "[t]he statutory language contemplates action by the Secretary to terminate the classification." Id. at 607. No such Secretarial action occurred herein. The Court's ruling in Buch v. Morton, supra, compels rejection of her contention that the segregative effect of the classification terminated 18 months after the classification was noted on the lands status records.

Appellant's alternative suggestion that, with respect to that portion of appellant's application located in sec. 4, T. 9 S., R. 31 W., MUC 818 effected a revocation of the R&PP classification must also be rejected. First of all, there is nothing inconsistent with multiple withdrawals of land and, where more than one withdrawal or reservation affects the same parcel, revocation of one withdrawal or reservation does not, ipso facto, result in nullification of other applicable withdrawals or reservations. See, e.g., Tenneco Oil Co., supra at 283 n.1 (1972). More to the point, MUC 818, by its own terms, covered only those lands "which are not withdrawn or reserved for a Federal use or purpose." See MUC 818 ¶ 1. Since the R&PP classification segregated the lands covered thereby from appropriation and reserved them for a Federal purpose, those lands were not affected by MUC 818. 11/

[6] Finally, appellant argues that, under the procedures established to implement the decision in Pence v. Kleppe, supra at 135, she is entitled to a hearing before an administrative law judge to prove her present assertion that she began her qualifying use of the parcel prior to July 17, 1961. This assertion is based on various witness statements from relatives which were filed with the Board on April 15, 1996. These statements uniformly state that Bonin accompanied her parents in trips to the parcel commencing in 1960. Qualifying use by appellant as of that date would, of course, precede the date of the R&PP classification.

If by these submissions appellant is now asserting that she commenced personal qualifying use prior to July 17, 1961, this claim is totally at odds with everything previously submitted by appellant. In BLM's February 11, 1976, letter to appellant, after advising her that the land which she sought had been segregated by the July 17, 1961, R&PP classification and that this would require rejection of her application, BLM expressly inquired as to whether any of the dates used in her application were in error. In response, Bonin submitted an affidavit which attested, inter alia, that "[s]tarting in 1966 I gathered berries from my land" and that "I caught fish also, beginning in 1966." See Affidavit of April 22, 1976. Furthermore, witness statements were submitted attesting to the fact that the land sought had been used by appellant "as an adult since 1966."

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11/ In this regard, we note that while BLM had originally purported to rely on MUC 818 as continuing the segregation of the land after the termination of the R&PP classifications, this ground was abandoned in its 1978 decision rejecting appellant's allotment application. Instead, BLM relied on the withdrawal effected by PLO 4582.

On appeal from BLM's original rejection of the application, counsel for appellant advised this Board that "[i]n 1966 the Appellant began use and occupancy of the land she is now claiming as her Native allotment." (1978 SOR at 3.) Attached to that SOR as Exhibits B, C, D, and E were statements from various witnesses attesting that appellant's use of the land began in 1966. The clear premise of appellant's challenge to BLM's rejection of her application was not that she had personally initiated qualifying use prior to July 17, 1961, but that she could show ancestral use of the land predating the R&PP classification. This was made explicit in her SOR: "The affidavits before the Board demonstrate ancestral use by the Appellant's ancestors on this allotment. Given the opportunity the Appellant will show such ancestral use predating Powersite Reserve No. 485 and R&PP Classification No. 142." (1978 SOR at 5.) It was in response to this argument that the Board expressly rejected affording appellant a Pence hearing by noting that, since "[a]dditional showings relating to ancestral use here would compel the same legal conclusions[,] \* \* \* no evidentiary hearing is warranted." Betty J. Thompson, supra at 177. Had appellant, at that time, alleged independent use commencing at the age of nine, she would have been afforded a hearing to allow her to establish that fact. See William Bouwens, 46 IBLA 366, 369 (1980). She did not so allege.

Viewed in historical context, appellant's present contentions must be seen as totally inconsistent with her own past statements. <sup>12/</sup> Based on our previous adjudication of appellant's assertions, we believe appellant is properly denied a hearing under Silas v. Babbitt, 96 F.3d 355 (9th Cir. 1996). As the Court in Silas noted, "One cannot create an issue of fact by simply contradicting one's own previous statement." Id. at 358 (citations omitted).

[7] There remains, however, the question as to the effect of Powersite Reserve No. 485 on our deliberations. On April 1, 1915, President Wilson signed an order of withdrawal for a powersite reserve in the Iliamna region of the Territory of Alaska. In relevant part, this order withdrew "[a]ll lands within one-quarter of a mile of Kakhonak Lake," and "[a]ll lands within one-quarter of a mile of Kakhonak River between Kakhonak River and Kakhonak Bay, an arm of Iliamna Lake." As noted on the applicable plats at the time of the original adjudication of appellant's allotment application by both BLM and the Board, this reserve impinged upon the northern portion of the parcel sought by appellant.

In adjudicating the application at that time, both the Board and BLM held that those lands covered by appellant's application which were within Powersite Reserve No. 485 <sup>13/</sup> had been closed to appropriation as

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<sup>12/</sup> Nor does appellant appear to be alone in contradicting statements previously tendered. Thus, Exhibit D to the 1976 SOR was a "Statement of Witness" from Donald F. Nielson, appellant's uncle, in which, in response to a question as to the year in which appellant began using the land, he stated "1966." Included among the witness statements filed by appellant in this appeal is one from Nielson in which, in response to the same question, he states "as a child 1960." See SOR, Ex. R.

<sup>13/</sup> These were lands located adjacent to a body of water in sec. 35, T. 8 S., R. 31 W., Seward Meridian.



of April 1, 1915, decades prior to appellant's birth. However, as noted above, section 905(d) of ANILCA, 43 U.S.C. § 1634(d) (1994), amended the applicable laws so as to allow, under most circumstances, allotment of lands within powersite withdrawals and classifications subject to certain conditions if the occupancy began after the withdrawal or classification. Thus, the existence of that Powersite Reserve would no longer be a bar to allowance of an allotment of those lands.

The initial question, then, is whether or not R&PP Classification Order No. 142 would bar allowance of the allotment. In other words, was the land within the allotment application which was covered by the Powersite Reserve also subject to the R&PP classification? We believe the answer to this question is in the negative based both on an analysis of the actual language of the classification order as well as the nature and scope of the powersite reserve vis-a-vis the R&PP classification.

In relevant part, the R&PP classification order provided that the classification was made "subject to" various land entries including "Power Site Reserve No. 485." (R&PP Classification Order No. 142, ¶ 3.) Thus, the R&PP classification was clearly subordinated to the powersite reservation. Moreover, the R&PP classification could not attach to the land while the powersite reservation was in effect because they are essentially incompatible. The powersite reservation was a retention classification, designed to keep the lands within Federal ownership. The R&PP classification, on the other hand, was a disposal classification since it identified land deemed suitable for disposal, by lease or sale, under the R&PP Act. These conflicting classifications could not, simultaneously, apply to the same parcel of land. The R&PP classification was basically a sword of Damocles, hovering over the land but not actually attaching to it until such time as the powersite reservation was revoked. Since the powersite reservation was never revoked, the R&PP classification never attached to the land.

There is, however, one additional facet to this problem. As we indicated above, all of the plats at the time that we rendered our initial decision indicated that the northern part of the parcel for which appellant had applied was invaded by Powersite Reserve No. 485. This continued to be true until the January 21, 1991, Master Title Plat (MTP). This MTP shows the Powersite Reserve as only embracing lands within secs. 25 and 36, T. 8 S., R. 31 W., Seward Meridian. In other words, none of the land embraced by appellant's application is shown as impinging upon the Powersite Reserve.

The reason for this change, while not explicated by BLM in the record before us, can be surmised. As noted above, the order establishing the Reserve described the lands involved, *inter alia*, as consisting of "[a]ll lands within one-quarter of a mile of Kakhonak River between Kakhonak River and Kakhonak Bay, an arm of Iliamna Lake." (Emphasis supplied.) The second reference to Kakhonak River in the order was clearly a misprint, since, as written, the description of the lands withdrawn is essentially undecipherable. Rather, what was obviously intended was that the withdrawal embrace all lands within one-quarter of a mile of Kakhonak

River between Kakhonak Lake and Kakhonak Bay. This, indeed, is the description utilized by the Federal Power Commission in a June 20, 1977, finding under section 24 of the FPA. 14/

Even correcting for this error, however, the actual situs of the lands withdrawn along the Kakhonak River between Kakhonak Lake and Kakhonak Bay partakes of an intrinsic indefiniteness. This uncertainty is derived from the fact that it was apparently unclear where the Kakhonak River ended and where Kakhonak Bay commenced. The MTP's in the file prior to 1991, clearly evince a belief that the Kakhonak Bay ended in the Northwest quarter of sec. 34, T. 8 S., R. 31 W., Seward Meridian. Located between Kakhonak Bay and the body of water identified as Kakhonak River in secs. 25 and 36, T. 8 S., R. 31 W., was another body of water (at some points, of considerable expanse) which invaded secs. 26, 27, 34, 35, and the extreme western portions of sec. 25 and 36. This body of water bore no identification and, given the fact that the powersite withdrawal was clearly drawn so as to embrace it, it is obvious that the cartographers had originally concluded that it was part of the Kakhonak River estuary.

The January 21, 1991, MTP, on the other hand, delineates this body of water as part of Kakhonak Bay and, since the powersite reserve consisted of lands along Kakhonak River between Kakhonak Lake and Kakhonak Bay, limits the withdrawal to those portions of secs. 25 and 36 which about the terminating point of the Kakhonak River, as newly defined. Because Powersite Reserve No. 485 had, by its own terms, always been limited to lands along the Kakhonak River between Kakhonak Lake and Kakhonak Bay, this change might raise the question of whether any of the land within Bonin's allotment application had ever actually been included within Powersite Reserve No. 485. 15/

14/ In its June 20, 1977, ruling, the Commission described the withdrawal at the Kakhonak site as "[a]ll lands within one-quarter of a mile of Kakhonak Lake and all lands within one-quarter of a mile of Kakhonak River between Kakhonak Lake and Kakhonak Bay, an arm of Iliamna River." (Order of June 20, 1977, at 2.) While the Commission eventually determined that it had no objection to revocation of Powersite Reserve No. 485 to the extent that it embraced the Kakhonak site (Order of June 20, 1977, at 4), no order of restoration was ever issued by the Department. Thus, the withdrawal effected by the Order of Apr. 1, 1915, continues to this date, subject, of course, to the provisions of section 905(d) of ANILCA. See generally Camel J. McIntyre (On Judicial Remand), 67 IBLA 317, 322-28 (1982).

15/ We note that the 1915 Order of Withdrawal had provided that "[a]ll lakes and streams herein described are as shown on Plate I, Bulletin 485, U.S. Geological Survey." A review of this Plate, however, far from resolving any question as to the situs of the lands intended to be withdrawn, actually complicates matters. Not only does the small scale of the map (1:250000) make it difficult to discern specific features but an examination of it shows that this map seemingly has the Kakhonak River originating from what is now referred to as Sid Larson Bay to the south of appellant's allotment rather than at the body of water, now denominated as part of Kakhonak Bay, to the north of the allotment.

We conclude, however, that this question need not be resolved herein since, regardless of whether or not the order establishing Powersite Reserve No. 485, itself, ever withdrew the northern portions now embraced within appellant's allotment application, the notation of the withdrawal on the relevant public land records effected the same result. As we noted above, at some length, the effect of a notation that lands are not available for entry or settlement, even if made in error, is to require that the lands be treated as noted until such time as the notation is removed and the lands restored to entry. See discussion supra. Inasmuch as the relevant records of the Department indicated that the lands involved were withdrawn by Powersite Reserve No. 485 not only as of 1966 when appellant claimed that she had commenced independent use and occupancy but also both in 1971, when the R&PP classification was revoked, and, again, in 1980, when section 905(d) of ANILCA was adopted, we believe that the provisions of section 905(d) are properly applied with respect to this part of the lands within appellant's allotment application.

Admittedly, the Board had already finally adjudicated this application in its entirety before ANILCA was adopted. However, the application of the doctrine of administrative finality by the Board is, as noted above, governed by jurisprudential considerations. Since we believe it is obvious that Congress intended to afford all Native allotment applicants, regardless of whether or not their applications had already been finally adjudicated, the benefit of section 905(d), we deem it appropriate to reinstate this portion of the allotment application. Pursuant to the provisions of 43 U.S.C. § 1634(d) (1994), we further find that this portion was legislatively approved as provided therein.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed, except to the extent that the application covered lands within Powersite Reserve No. 485 as to which lands the decision is reversed and the case file remanded for further action consistent herewith.

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James L. Burski  
Administrative Judge

I concur:

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Lisa Hemmer  
Administrative Judge